ADDENDUM

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH, Clerk

Room 408-400 Royal St., New Orleans, La. 70130

June 3, 1971

Clerk
U. S. District Court
P. O. Box 669
Miami, Florida 33101

Re: No. 30514 — Theresa M. Bodnar vs. Catherine Bodnar, Margaret Bodnar, et al. D. C. No. Civ. 68-1386

Dear Sir:

(X) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(XX) Copy of the Court's opinion.

( ) Original record on appeal or review. (SEE ATTACHED LETTER)

( ) Original exhibits.

( ) Bill of Costs approved by this Court.

( ) The judgment provides that appellee pay the costs in this Court. Since the case was docketed in forma pauperis without pre-payment of fees and costs, the Clerk's docketing fee of $25.00 is now payable to this office by appellee, and by copy of this letter counsel is being so advised.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Claudette Staiger
Deputy Clerk

enc.
cc: (Letter only)
Mr. J. M. Flowers
Mr. Sam Daniels
Mr. Irving Cypen
Mr. Harris J. Buchbinder

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH, Clerk

Room 408-400, Royal St., New Orleans, La. 70130

June 3, 1971

TO ALL COUNSEL AND THE DISTRICT CLERK:

RE: No. 30514 — Theresa M. Bodnar vs. Catherine Bodnar, Margaret Bodnar, et al. D. C. No. Civ. 68-1386

I regret to advise that a recent fire in our office has destroyed the original bound record on appeal in this case. We must defer to the District Court the question whether or not the parties will be required to reconstruct its record; and this Court request counsel's cooperation in this regard. We enclose to the Clerk a copy of the reproduced appendix which his court may consider sufficient or which may help the parties in reconstructing the record.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

Add. 4

By /s/ Claudette Staiger

Deputy Clerk

/cms
Enc.
cc: Mr. J. M. Flowers
Mr. Sam Daniels
Mr. Irving Cypen
Mr. Harris J. Buchbinder

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30514

THERESA M. BODNAR,
Plaintiff-Appellant,

versus

CATHERINE BODNAR, MARGARET BODNAR, Individually and as Administratrix of the Estate of MARY H. BODNAR, Deceased, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(April 28, 1971)

Before BROWN, Chief Judge, PHILLIPS* and INGRAHAM, Circuit Judges.

PER CURIAM: The sole issue in this case is whether the District Court could properly dismiss Appellant's (Theresa M. Bodner) case, without prejudice, after she had refused to submit to a mental examination for the purpose of determining whether she was mentally competent to understand the nature and effect of the litigation she had instituted, so that if needed a guardian ad litem could be appointed. We affirm.

*Of the Tenth Circuit, sitting by designation

The Defendants filed a motion for an order requiring Theresa M. Bodnar to submit to an examination to determine if she were mentally competent to understand the nature and effect of her suit.

The District Judge, with ample factual basis for apprehending Appellant's incompetence, granted the motion. Appellant nevertheless refused to comply with this order. In view of this deliberate refusal to comply with the order, the Court dismissed the case without prejudice January 26, 1970.

Appellant took no appeal from the final judgment of dismissal, but she did file a petition of mandamus in this Court. We dismissed the petition.

With the judgment now final and unappealable, Appellant filed a F.R.Civ.P. 60(b) (4) motion in the Trial Court in which she sought to vacate the judgment of dismissal on the ground that it was void for want of jurisdiction. F.R.Civ.P. 60(b) (4). The Court denied the 60(b) motion. The Court had plenary power under F.R.Civ.P. 17(c), cf. F.R.Civ.P. 35(a), to order the examination of Appellant under appropriate protective restrictions as to which there can be no complaint here.

A trial court is not powerless to ascertain whether a litigant is competent and, if it finds that he is not, to appoint a guardian ad litem. Where there is a showing of a substantial question of competency, the Judge with protective restrictions can, in making that determination, require a medical examination. Nothing in *Schlagenhauf v. Holder*, 1964, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152, in considering F.R.Civ.P. 35(a) compels us to reach a contrary result.

AFFIRMED.

Supreme Court, U.S.
FILED
SEP 13 1971
E. ROBERT SEAVER, CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-278

THERESA M. BODNAR,

Petitioner,

vs.

CATHERINE BODNAR, MARGARET BODNAR, individually and as Administratrix of the Estate of MARY H. BODNAR, Deceased, ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals Fifth Circuit

BRIEF OF RESPONDENTS

IRVING CYPEN
825 Arthur Godfrey Road
Miami Beach, Florida 33140
Attorney for Catherine Bodnar and Margaret Bodnar, Individually and as Administratrix of the Estate of Mary H. Bodnar, Deceased

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Administrator Ad Litem for the Estate of Mary H. Bodnar, Deceased.

MIAMI REVIEW — 371-4853 — 377-3721

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in the

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OCTOBER TERM, 1971

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals Fifth Circuit

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BRIEF OF RESPONDENTS

Petitioner prays that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion here sought to be reviewed is reported as **Bodnar v. Bodnar** (5th Cir. 1971), 441 F.2d 1103. The order of the United States District Court for the Southern District of Florida which was affirmed below is unreported but appears at A. 70.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The opinion of the Court of Appeals is dated April 28, 1971. Petitioner's timely petition for rehearing was denied on May 25, 1971, without opinion.

QUESTION PRESENTED

Plaintiff so conducted herself in a United States district court as to raise serious doubts as to her mental competency. After such conduct, the district court ordered plaintiff to submit to a mental examination to determine if she needed a guardian ad litem. Under such circumstances, was the order requiring the mental examination "void" within the meaning of Federal Rule of Civil Procedure 60(b)(4)?

NOTE: "A" refers to the printed Appendix filed in the Court of Appeals below.

STATEMENT OF THE CASE

In 1968, petitioner filed a complaint against her sisters in the United States District Court for the Southern District of Florida contesting the ownership of certain joint bank accounts and other funds (A. 1). In 1969, the district court appointed an administrator ad litem to represent the estate of the parties' deceased mother (A. 33). Thereafter on motion of the administrator (A. 52), the trial court entered an order finding that serious doubt existed as to petitioner's mental competency (A. 62). Pursuant to this finding, petitioner was ordered to submit to a mental examination to determine "whether, pursuant to Federal Rule 17(c), a guardian ad litem should be appointed to represent and protect the plaintiff's interest or whether some other type of order should be entered for her protection." (A. 63).

After petitioner refused to submit to the examination, the district court dismissed her complaint without prejudice (A. 68). As stated in the opinion below, 441 F.2d at 1104, petitioner did not appeal the dismissal, but did file a petition of mandamus which was dismissed.

Thereafter, petitioner filed a motion to vacate the trial court dismissal under Federal Rule 60(b)(4). The sole basis for the motion was that the order requiring a mental examination was void for want of jurisdiction (A. 69). The trial court denied the motion and, on appeal, the Court of Appeals affirmed, saying at 441 F.2d 1104:

> "... The Court had plenary power under F.R.Civ. P. 17(c), cf. F.R.Civ.P. 35(a), to order the exam-